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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: TeQcom, Inc.
File: B-224664
Date: December 22, 1986

DIGEST

1. The General Accounting Office sustains a protest alleging improper use of brand name or equal procedures where the contracting agency failed to meet statutory obligations to draft specifications and use advance planning to obtain full and open competition. The agency effectively deprived offerors of any opportunity to qualify their products so that they could compete with the "brand name" manufacturer, thus conducting a sole-source procurement without justifying it.
2. When the General Accounting Office sustains a protest against an unjustified sole-source award, the protester is entitled to recover the costs of filing and pursuing the protest.

DECISION

TeQcom, Inc. protests the terms and conditions of request for proposals (RFP) No. DAKF01-86-R-0024, issued by the Department of the Army, Contracting Division, Presidio of San Francisco. The Army sought additional units of a telecommunications system that not only transmits messages but also provides word processing capabilities. TeQcom contends that the Army has improperly excluded offerors other than CPT Corporation, the "brand name" manufacturer that participated in the development of the system and the only firm that has the required certification. The result, according to TeQcom, is an improper sole-source procurement.

Because we find that the Army failed to meet its statutory obligations to obtain full and open competition and to provide offerors other than CPT with an opportunity to qualify their proposed systems, we sustain the protest.

BACKGROUND

In late 1979, the Army developed the concept of a telecommunications system that permits users remote from

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telecommunications centers to send or receive messages on-site, while at the same time providing word processing capability. The Army chose CPT as the prime contractor for the prototype system, which was known as FAST (Fast, Accurate, Simple, TEMPEST). The first system was activated in November 1981 after passing a "rigorous test and acceptance procedure," and a second terminal was activated after a further year of evaluation. Based upon the successful performance of the two prototypes, and with the expectation that significant cost savings would result, the Army classified FAST as a Standard Army System in April 1983 and purchased 25 additional terminals. The Defense Communications Agency (DCA) tested the FAST system in October 1985 and certified that it met the Category III--operational testing--requirements for use on AUTODIN, the defense communications network. In early 1986, the Army's FAST systems product manager requested and obtained authority to procure additional systems, and the protested procurement was synopsisized in the Commerce Business Daily (CBD) on July 14 and July 25.

Shortly thereafter, on August 12, the Army requested proposals, due by September 15, for the lease or purchase of 4 FAST systems to be delivered to Hickam Air Force Base, Hawaii, within 30 days after award. The solicitation specified a "CPT BRAND NAME OR EQUIVALENT" system that included CPT model 8100T word processors, CPT rotary printers, Genicom-brand dot matrix printers, and Analytics Communications Systems telecommunications line controllers. The specifications required Category III certification, evidence of which was to be submitted with proposals, and award was to be made to the offeror with the lowest evaluated life cycle cost.

TeQcom initially responded to the solicitation on September 2 by requesting the contracting officer to break out and procure separately those items not manufactured by CPT. It indicated that it could provide an equivalent to the Analytics line controller at a substantial cost savings to the government. The firm subsequently indicated, however, that given adequate specifications, it could provide an entire, equivalent system, and on or about September 8, TeQcom requested a set of specifications, a delay in the closing date for receipt of proposals, and agency sponsorship for Category III testing.

According to TeQcom, the FAST systems product manager to whom it had been referred agreed to provide a user's manual but indicated that no other specifications for it existed. He refused TeQcom's other requests and allegedly informed the firm that he was very happy with the current system and saw no reason to delay the procurement for the 6 months required to schedule Category III testing.

TeQcom thereupon filed this protest with our Office, and, the Army has now extended the closing date indefinitely.

SPECIFICATIONS

TeQcom alleges that the specifications included in the RFP are inadequate, providing no more than a general overview of the FAST system, without any indication as to how the components are to be connected. The FAST system's product manager, responding as the contracting officer's technical representative, maintains that the description is complete, and that there is no requirement for the Army to reissue a technical specification every time it wants to buy something that has already been proven successful.

The Competition in Contracting Act of 1984 (CICA) requires agencies to develop specifications in such a manner as is necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired. 10 U.S.C. § 2305(a)(1)(A)(iii). In addition, the Department of Defense Supplement to the Federal Acquisition Regulation, 48 C.F.R. § 210.004(b)(3)(i)(B) (1985), requires "brand name or equal" purchase descriptions to set forth those salient physical, functional, or other characteristics of the referenced products that are essential to satisfying the minimum needs of the government.

Based upon the Army's own analysis of the FAST system, as set forth in an August 1983 report issued by the Office of the Product Manager, it does not appear that the RFP in this case set forth those characteristics which the Army considers essential. The report describes in considerably more detail than the RFP the capabilities and capacities of the significant components of the FAST system; for example, it specifies that the word processor possesses 128 kilobytes of internal memory and has two disc drives with 630 kilobytes of storage per disc. If these are features of the CPT 8100T word processor that the Army considers essential, the solicitation should list them as salient characteristics, along with any others. We find the RFP deficient in this regard.

QUALIFICATION REQUIREMENT

More importantly, TeQcom contends that the agency made it impossible for any offeror other than CPT, the manufacturer that participated in the development of the FAST system, to become certified. TeQcom does not, as the Army suggests, protest the requirement for Category III certification itself. In particular, TeQcom questions the Army's refusal

to sponsor it, a prerequisite for Category III testing, and challenges the agency's claim that scheduling such testing will require 6 months.

The FAST systems product manager states that there is "no reason to go to the cost of attempting certification of another system when the present one meets the need." He also maintains that any delay in this procurement would diminish the significant cost savings (an estimated 4 million dollars a year) that the Army expects to realize when the first 19 FAST terminals are installed. According to the agency, a delay also would postpone the upgrading of an essential telecommunications center.

CICA generally requires contracting agencies to obtain full and open competition through the use of competitive procedures. 10 U.S.C. § 2304(a)(1)(A) (Supp. III 1985). Agencies intending to solicit bids or proposals for a contract expected to exceed \$10,000 must publish in the CBD a notice that accurately describes the property or services to be procured and states whether a qualification requirement must be met. 41 U.S.C. § 416(b) (Supp. III 1985). Additionally, the Defense Procurement Reform Act of 1984^{1/} requires the head of the concerned agency, before establishing a qualification requirement, to ensure that potential offerors are provided, upon request, with a prompt opportunity to demonstrate their ability to meet the standards specified. 10 U.S.C. §§ 2319(a) and (b) (Supp. III 1985). Where the number of qualified sources or products available to compete actively for an anticipated future requirement is less than two, the agency must periodically publish notices in the CBD, soliciting additional sources or products to seek qualification. 10 U.S.C. § 2319(d).

In this case, there is nothing in the record to indicate that the Army made an effort to comply with these statutory requirements. Although DCA certified the FAST system for operational use in October 1985, the Army advises us that other than the CBD notices synthesizing the current procurement, there were no notices seeking sources other than CPT for Category III testing. Moreover, the synopses of this procurement do not mention the certification requirement. Compare B.H. Aircraft Co., Inc., B-222565 et al., Aug. 4, 1986, 86-2 CPD ¶ 143 (protester was aware of source approval requirement, and tests for critical aircraft parts were developed after CBD synopsis). Finally, the Army denied

^{1/} This Act was part of the Department of Defense Authorization Act, 1985, Pub. L. No. 98-525 (Oct. 19, 1984).

TeQcom's request for sponsorship for Category III testing. Since, as noted above, offerors were required to submit evidence of certification with their proposals, the result was to unreasonably exclude TeQcom from the competition.

The fact that the Army is satisfied with the systems provided by CPT in no way relieves it of the statutory obligation to obtain full and open competition. Had the Army fulfilled this obligation beginning in October 1985, it might have avoided having to choose--in September 1986--between what is in effect a sole-source procurement and delaying in order to afford TeQcom and other potential offerors an opportunity to qualify their products.

Agencies must use advance procurement planning and market research to open the procurement process to all capable contractors. CICA specifically provides that agencies may not justify the use of noncompetitive procedures on the basis of a lack of advanced planning. 10 U.S.C. §§ 2304(f)(5) and 2305(a)(1)(A); H.R. Rep. No. 98-861, 98th Cong. 2d Sess. 1422-1423, 1428 (1984). See also Rampart Services, Inc., 65 Comp. Gen. 164 (1985), 85-2 CPD ¶ 721 (protest sustained where agency acknowledges that, due to lack of advance planning, only firms with established communications networks in South America can meet its needs); cf. Freund Precision, Inc., B-223613, Nov. 10, 1986, 66 Comp. Gen. ___, 86-2 CPD ¶ ___ (agency's failure, during 16-month evaluation period, --to consider first article testing for alternate product is unreasonable). Because of this statutory obligation, we have denied protests only when there was some justification--other than lack of advance planning--for restricting a procurement to one or a few approved sources. See generally Engine & Generator Rebuilders, 65 Comp. Gen. 191 (1986), 86-1 CPD ¶ 27; Astronautics Corp. of America, B-222414.2 et al., Aug. 5, 1986, 86-2 CPD ¶ 147; Aerospace Engineering and Support, Inc., B-222834, July 7, 1986, 86-2 CPD ¶ 38.

Here, we find no justification for effectively restricting the procurement to a single qualified source except lack of advance planning.

While agencies need not delay procurements to provide potential offerors with an opportunity to demonstrate their ability, 10 U.S.C. § 2319(c)(5), we view this provision as presupposing that the agency has made reasonable, good faith efforts to encourage competition. Any other interpretation would frustrate both the intent of Congress, H.R. Rep. No. 98-1080, 98th Cong., 2d Sess. 319 (1984), and the

prohibition on the use of a lack of advanced planning to justify noncompetitive procurement. 10 U.S.C. § 2304(f)(5).


Accordingly, we sustain the protest. We find that the Army failed to draft specifications or to use advance planning to obtain full and open competition, and failed to afford potential offerors, including TeQcom, an opportunity to undergo Category III testing and obtain certification either before or during this procurement.

RECOMMENDATIONS

By letter of today to the Secretary of the Army, we are recommending that the agency cancel the solicitation and take immediate and vigorous steps to encourage additional competition by providing TeQcom and any other prospective offerors with an opportunity to undergo Category III testing.

Meanwhile, the Army should purchase only those FAST systems for which it can demonstrate that it has an urgent and compelling need. In view of our finding that this was, in effect, an unjustified sole-source procurement, we also find the protester entitled to recover the costs of filing and pursuing the protest. AT&T Information Services, Inc., B-223914, Oct. 23, 1986, 66 Comp. Gen. ___, 86-2 CPD ¶ ___. --

The protest is sustained.

for 
Comptroller General
of the United States